A **DATUK SERI ANWAR IBRAHIM v. KERAJAAN MALAYSIA & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[APPLICATION FOR JUDICIAL REVIEW NO: WA-24-97-08-2016]
B 5 JANUARY 2017

CONSTITUTIONAL LAW: *Courts – High Court – Jurisdiction – Whether Parliament has authority to amend Federal Constitution – Doctrine of 'basic structure' – Whether imposes limitation on Parliament's powers to amend*
C *Constitution – Challenge on validity of constitutionality of impugned provision – Whether must specifically ask for declaration that law was invalid – Whether proceeding may only be commenced with leave of Federal Court Judge – Whether art. 149 of Federal Constitution empowers Parliament to make special law relating to specific situations concerning security and public order – Whether High Court*
D *has jurisdiction to embark on challenges made against impugned law – Whether challenge fell within scope of art. 4 cls. (3) and (4) of Federal Constitution*

CIVIL PROCEDURE: *Preliminary objection – Issues raised – Courts – High Court – Jurisdiction – Whether Parliament has authority to amend Federal Constitution – Doctrine of 'basic structure' – Whether imposes limitation on Parliament's powers*
E *to amend Constitution – Challenge on validity of constitutionality of impugned provision – Whether must specifically ask for declaration that law is invalid – Whether proceeding may only be commenced with leave of Federal Court Judge – Whether art. 149 of Federal Constitution empowers Parliament to make special law relating to specific situations concerning security and public order – Whether High*
F *Court has jurisdiction to embark on challenges made against impugned law – Whether challenge fell within scope of art. 4 cls. (3) and (4) of Federal Constitution – Whether preliminary objection ought to be allowed*

In this originating summons ('OS), the plaintiff sought a declaration that the Constitutional Amendment Acts that led to the amendment of art. 66(4) of
G the Federal Constitution and the insertion of art. 66(4A) were unconstitutional. Consequently, the plaintiff sought a declaration that the National Security Council Act 2016 ('NCSA') which came into force pursuant to art. 66(4A) was void and unconstitutional. In this present application, the plaintiff sought an interim injunction pursuant to O. 29 of
H the Rules of Court 2012 and/or inherent jurisdiction of the court to prevent the defendants from taking any action under the NCSA until the disposal of the OS. The plaintiff contended that (i) art. 66(4) that stood before the impugned amendments is a basic structure of the Federal Constitution and as such, Parliament has no power to amend the said article; (ii) the NCSA

I

was also unconstitutional because it came into force pursuant to the provisions of art. 66(4A) which were unconstitutional; and (iii) the power of Parliament to enact security laws was confined to art. 149 of the Federal Constitution and as such the NCSA which was not enacted pursuant to art. 149 was unconstitutional. The plaintiff submitted that justice of the case lay towards the grant of an interim injunction as the issues involved was a matter of grave public importance. The Senior Federal Counsel ('SFC') in raising a preliminary objection with regards to the jurisdiction of this court to hear the OS, submitted that the plaintiff's attack on the validity of the Constitution Amendment Acts and the NCSA fell within the provisions of cls. (3) and (4) of art. 4 read with art. 128 and therefore the High Court had no jurisdiction to determine whether the impugned laws were invalid. The main issue for determination was whether the proceeding in this present OS must be commenced in the Federal Court as the court of first instance has to require the plaintiff to obtain leave of a judge of the Federal Court as provided under art. 4(4) of the Federal Constitution.

Held (allowing preliminary objection; dismissing OS with no order as to costs):

(1) It was the plaintiff's submission that Parliament has no authority to amend the Federal Constitution and in particular art. 66 so far as to alter its basic structure. The 'basic structure doctrine is a matter connected to Parliament's power to amend the Constitution. It imposes a limitation on Parliament's power to amend the Constitution and concerns the question whether Parliament has power to amend or has exceeded its power to amend a provision of the Constitution. It was not a question that fell to be questioned under cl. (1) of art. 4 Therefore, the party seeking to challenge the validity of the constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court. The plaintiff's challenge on the 'basic structure point was in substance a question of Parliament's power to make laws amending the Constitution and therefore fell within the ambit of cl. (3) of art. 4 (paras 23, 32, 33 & 38)

(2) Article 149 of the Federal Constitution is an enabling provision that empowers Parliament to make a special law relating to specific situations concerning security and public order. The article provides that if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons of the kind specified in cl.1 (a) to (e) of art. 149 'any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13, or would apart from this article to be outside the legislative power of Parliament. (para 40)

(3) The challenge by the plaintiff in respect of the NCSA was based on the ground that the law was inconsistent with the provisions of art. 149. To say that a security law can only be made under art. 149 would place a severe limitation on the power of Parliament to make laws relating to security. Therefore, that challenge went directly to the power of Parliament to make law. (paras 42 & 43)

(4) The application for the *ex parte* injunction was based on the subject matter which the High Court had no jurisdiction to embark on the challenges made against the impugned laws. The plaintiff's challenge therefore clearly fell within the scope of art. 4, cls. (3) and (4) of the Federal Constitution. (para 44)

Case(s) referred to:

Abdul Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC ***(refd)***

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Rethana M Rajasigamoney v. The Government of Malaysia [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 FC ***(refd)***

State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975 FC ***(refd)***

Syarikat Banita Sdn Bhd v. Government of State of Sabah [1977] 1 LNS 125 FC ***(refd)***

The Government of Malaysia v. Robert Linggi [2015] 1 LNS 1515 CA ***(refd)***

Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***

Yeoh Tat Thong v. Government of Malaysia & Anor [1973] 1 LNS 180 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4(1), (3), (4), 5(1), 8(2), 9(2), 10(1)(a), 11(4), 13, 66(4), (4A), 122A, 128(1)(a), 149(1)(a), (b), (c), (d), (e), 159

Rules of Court 2012, O. 29

Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 66

For the plaintiff - N Surendran, Latheefa Koya & Shahid Adli; M/s Daim & Gamany
For the defendants - Amarjeet Singh & Alice Loke; SFCs

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] In this originating summon ("OS"), the plaintiff is seeking for a declaration that the Constitutional Amendment Acts that led to the amendment of art. 66(4) of the Federal Constitution and the insertion of

art. 66(4A) are unconstitutional. Consequentially, the plaintiff seeks a declaration that the National Security Council Act 2016 ("NSCA") which came into force pursuant to art. 66(4A) is void and unconstitutional.

Constitutional Amendment Acts

[2] The original art. 66(4) stipulated that a Bill passed by Parliament only becomes law if it is assented to by the Yang di-Pertuan Agong. The impugned amendments changed this position. Now a Bill becomes law even if it is not assented to by the Yang di-Pertuan Agong after 30 days of being presented to His Majesty.

[3] Since the plaintiff challenged the constitutional validity of art. 66(4A) of the Constitution, I consider it is necessary to reproduce the same:

> 66. Exercise of legislative power
>
> (4a) If a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in Clause (4), it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto.

Interim Injunction

[4] In this present application, the plaintiff is seeking for an interim injunction to prevent the defendants or their agents from taking any action under the NCSA until the disposal of the OS. The application for the interim injunction is being made pursuant to O. 29 of the Rules of Court 2012 and/or the inherent jurisdiction of the court.

The Plaintiff's Submission On Interim Injunction

[5] Learned counsel for the plaintiff contended that:

(a) Article 66(4) that stood before the impugned amendments is a basic structure of the Federal Constitution and as such Parliament has no power to amend the said article;

(b) The NSCA is also unconstitutional because it came into force pursuant to the provisions of art. 66(4A) which are unconstitutional; and

(c) The power of Parliament to enact security laws is confined to art. 149 of the Federal Constitution and as such the NSCA which is not enacted pursuant to art. 149 is unconstitutional.

[6] In support of his submission that there are the serious issues to be tried, learned counsel for the plaintiff drew attention to the case of *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193.

[7] It was submitted for the plaintiff that justice of this case lies towards the grant of an interim injunction as the issues involved is a matter of grave public importance.

[8] It was argued for the plaintiff that unless prohibited by order of injunction, the defendants are free to act under the provisions of the NSCA which will lead to destruction including loss of life and property which cannot be compensated.

Preliminary Objection

[9] Learned Senior Federal Counsel raises a preliminary objection with regards to the jurisdiction of this court to hear the OS.

[10] Learned Senior Federal Counsel submitted that the plaintiff's attack on the validity of the Constitution Amendment Acts and the NSCA falls within the provisions of cls. (3) and (4) of art. 4 read with art. 128 and therefore the High Court has no jurisdiction to determine whether the impugned laws are invalid.

[11] In support of his contention, learned Senior Federal Counsel relied on the following authorities:

(i) *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112;

(ii) *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri* [2014] 6 CLJ 541; [2014] 4 MLJ 765;

(iii) *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975; [2015] 6 MLJ 736; and

(iv) *The Government of Malaysia v. Robert Linggi* [2015] 1 LNS 1515.

[12] In response, learned counsel for the plaintiff urged that in this present case, there is no attack on parliamentary authority to make the legislation as specified in art. 4(3) of the Federal Constitution.

[13] Learned counsel for the plaintiff contended that cl. (3) is attracted only where the subject matter of legislative competence arose, that is when Parliament makes law in respect of matters in the State list or when the State Legislatures make law in respect of matters in the Federal list.

[14] In support of his submission, learned counsel for the plaintiff placed reliance on the following authorities:

(i) *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112;

(ii) *Yeoh Tat Thong v. Government of Malaysia & Anor* [1973] 1 LNS 180; [1973] 2 MLJ 86;

(iii) *Syarikat Banita Sdn Bhd v. Government of State of Sabah* [1977] 1 LNS 125; [1977] 2 MLJ 217; and

(iv) *Rethana M Rajasigamoney v. The Government of Malaysia* [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323; [1984] 2 MLJ 52.

[15] Learned counsel for the plaintiff pointed out that the cases submitted by the defendants can be distinguished on the ground that the cases concern 'collateral attacks' against State laws on the ground that the State Legislatures lacked authority to make the law in question. Hence it was submitted for the plaintiff that the cases relied by the defendants do not apply to the facts of the plaintiff's case.

[16] A view advanced by learned counsel for the plaintiff turns upon the fact that art. 66(4) was amended to dispense with the Royal Assent. The plaintiff contended that the Royal Assent is part of the basic structure of the Constitution because it emanates from the fourth pillar, namely the Conference of Rulers. An Act that amends the Constitution has to be procedurally proper. In other words, it must comply with the procedural steps prescribed in art. 159. But although those procedural steps may have been complied with, the Act may nevertheless be inconsistent in the art. 4(1) because it is – to quote the words of art. 4(1) "inconsistent with this Constitution". The National Security Council Act 2016 is the product of an article which is inconsistent with the Constitution under art. 4(1). Since the foundation is void, the product is also void.

[17] Learned counsel for the plaintiff also argued that the NCSA is inconsistent with art. 149 and therefore such a challenge can be made under cl. (1) of art. 4.

Issue

[18] In my view, the issue of this court's jurisdiction should be heard and decided first, leaving the issue of the interim injunction, if relevant to be dealt with later.

[19] The main issue for determination is whether the proceeding in this present OS must be commenced in the Federal Court as the court in first instance has to require the plaintiff to obtain leave of a judge of the Federal Court as provided under art. 4(4) of the Federal Constitution.

Decision

[20] It is necessary to discuss the question of the applicability of art. 4(3) and 4(4) to be read with art. 128 of the Federal Constitution.

[21] In the present case, it is relevant to reproduce the relevant provisions of art. 4(3) and art. 4(4) and as well as art. 128(1)(a) of the Federal Constitution, which are as follows:

> Article 4 (3);
>
> The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –

A (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

Article 4 (4);

B

Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might C be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

Article 128 (1) (a);

The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating D the exercise of such jurisdiction:

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power E to make laws; ...

[22] I have carefully perused the OS and in my view, the substance of the plaintiff's challenge is that Parliament has no power to enact:

(a) The Constitutional Amendment Acts that led to the amendment of art. 66(4) and the insertion of art. 66(4A) in the Federal Constitution F violates the basic structure of the Constitution; and

(b) The NSCA as the law was not enacted pursuant to art. 149 of the Constitution.

[23] In fact, in support of the OS, the plaintiff states in para. 4 that:

G

Parliament has no authority to amend the Federal Constitution and in particular Article 66 so far as to alter its basic structure.

[24] The Federal Court in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 held that:

H

First, clause (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

I (a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for anyone to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it.

[25] These principles were followed by the Federal Court in *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 8 CLJ 975; [2015] 6 MLJ 736. In *Muhammad Juzaili*, the appellants contended that s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 is invalid due to it being inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a). The Federal Court held as follows:

[26] Similarly, in the present case, the application for judicial review filed by the respondents was, *inter alia*, to seek a declaration that s. 66 is null and void for being inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. We are of the view that the application for the declarations sought by the respondents before the High Court by way of judicial review was in fact, a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents attempted to do was to limit the legislative powers of the State Legislature, by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by art 74 of the Federal Constitution read with List II in the Ninth Schedule to the Federal Constitution, that legislation must still comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. The

A application for the declarations sought by the respondents should have been dismissed by the High Court on the ground that the High Court has no jurisdiction to hear the matter.

[26] Further, the Federal Court held that:

B [27] Thus, we are not persuaded by the submissions of learned counsel for the respondents that the respondents are not questioning the legislative powers of the State Legislature. The respondents' argument, that the legislation on Islamic law passed by the State Legislature must comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution, is an argument that directly C questions the legislative powers of the State Legislature. For all intent and purposes, it was a direct challenge to the validity or constitutionality of s 66 passed by the State Legislature of Negeri Sembilan. As stated earlier, such a challenge must be in accordance with the specific procedure as specified in cll. (3) and (4) of art 4the Federal Constitution.

D [28] We are of the view that since the respondents had failed to follow the specific procedure as laid down in cll. (3) and (4) of art 4 of the Federal Constitution, the learned judges of the Court of Appeal as well as the High Court were in grave error in entertaining the respondents' application to question the validity or constitutionality of s. 66 by way of judicial review.

E **[27]** In the *Titular Roman*'s case, the impugned law was made pursuant to cl. (4) of art. 11 which confers power on the State Legislature for the respective States and Parliament for the Federal Territories to make law that control or restrict the propagation of any religious doctrine and belief amongst Muslims.

F **[28]** Ariffin Zakaria CJ held that the issue in the case was whether the High Court could entertain a challenge where the Legislature had exceeded the object of law within its legislative competence in the following words:

[39] The net effect of the finding of the learned High Court judge is that the impugned provision is invalid, null and void, and unconstitutional as G it exceeds the object of art. 11 (4) of the Federal Constitution. The respective States' Legislature thus has no power to enact the impugned provision. The issue is, could the High Court judge entertain such a challenge in light of specific procedure in cll. (3) and (4) of art 4 of the Federal Constitution.

H [40] ... The present case may be classified as the proceedings of type (a) as illustrated by Suffian LP in *Ah Thian*'s case.

[29] The Federal Court in the *Titular Roman*'s case have read the phrase, "the relevant Legislature has no power to make law", in cl. (3) of art. 4 of the Federal Constitution to cover situations where the relevant Legislature I had exceeded the power within its legislative competence.

[30] The principles of *Ah Thian* were also followed by the Court of Appeal in *The Government of Malaysia v. Robert Linggi* (Civil Appeal No. S-01-247-2011, unreported). In this case, the respondent was challenging the amendments made to the old art. 122A cls. (3) and (4) of the Federal Constitution being null and void, insofar as they concern the removal of the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak to appoint Judicial Commissioners.

[31] The Court of Appeal held that:

> [65] As such the provisions of Article 159 Clause (1) read with Article 161E must necessarily mean that Parliament has no power to enact an Act to effect such an amendment as is the subject matter of Article 161E Clause (2) without the prior occurrence of the Yang di-Pertuan Negeri of Sabah or Yang di-Pertua Negeri of Sarawak or both, as the case may be.
>
> [66] The Plaintiff's challenge is in substance a challenge to the validity of sections 15 and 16 of the Amending Act on the basis that Parliament had enacted a federal law which made provision with respect to a matter which, by virtue of the occurrence of the Yang di-Pertua Negeri of Sabah and Yang di-Pertua Negeri of Sarawak not having been obtained, it (Parliament) had no power to enact.

[32] In the light of the principles cited in the above authorities, in my view, the present case may be classified as the proceedings of type (a) as illustrated by Suffian LP in *Ah Thian*'s case. I accept the submission of learned Senior Federal Counsel that the 'basic structure' doctrine is a matter connected to Parliament's power to amend the Constitution. It imposes a limitation on Parliament's power to amend the Constitution and concerns the question whether Parliament has power to amend or has exceeded its power to amend a provision of the Constitution. It is not a question that falls to be questioned under cl. (1) of art. 4.

[33] Therefore, the party seeking to challenge the validity of the constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court.

[34] Referring to the Supreme Court in the case of *Abdul Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah* [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1; [1988] 1 MLJ 171, the Court of Appeal in the case of *The Government of Malaysia v. Robert Linggi* explained the underlying reasons behind cl. (3) and cl. (4) of the Federal Constitution as follows:

> [41] Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the Legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific

declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

[35] As rightly pointed out by learned Senior Federal Counsel, the case of *Rethana v. Government of Malaysia,* the *Titular Roman's* case and *Robert Linggi*'s case and *Muhammad Juzaili*'s case have shown that the situations covered by cl. (3) cover where Parliament or the State Legislatures have exceeded the powers to make laws with respect matters within their competence to legislate.

[36] In *Rethana*'s case, it was clearly shown that cl. (3) is not restricted to the situation stated in *Ah Thian* and *Syarikat Banita*. Azmi FJ explained that cl. (3) applies to where Parliament has exceeded its power to legislate on a matter within its competence to legislate in the following words:

> Later in 1980, Suffian L.P. had another opportunity to consider the same point in *East Union (M) Sdn Bhd v. The Government of the State of Johore and the Government of Malaysia* [1980] 2 MLJ 143. There the learned Lord President distinguished the case from *Syarikat Banita (ante)* in that in the earlier case which dealt with a new subsection 24(7) of the Sabah Enactment "the contention was that the impugned law was contrary to the Constitution" whereas in *East Union* which concerned the validity of section 100 of the National Land Code "the contention here being that Parliament exceeded the power given to it by Article 76(4) when it enacted the section. In other words, the contention is that Parliament did not have power to enact it." With great respect, I entirely agree with the judgments of the learned Lord President in both the cases.

[37] In *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, Wan Sulaiman FJ was of the view that the issue of whether the fundamental liberties can be amended is a restriction on the amending power of Parliament in the following words:

> This appeal in substance questions the validity of a law made by Parliament, in the words of Article 4 (3) of the Constitution, "on the ground that it makes provision with respect to any matter with respect to which Parliament ... has no power to make laws ..." What raja Abdul Aziz says amount to this: Parliament cannot amend any of the Fundamental Liberties Articles beyond what is expressly permitted by Part II itself. I should therefore treat this appeal as a proceeding for a declaration such as is envisaged in Article 4 (3) and I declare that the amendment to Article 5 (4) by Act A354/76 is valid.

[38] Therefore, in my view, the plaintiff's challenge on the 'basic structure' point is in substance a question of Parliament's power to make laws amending the Constitution and therefore falls within the ambit of cl. (3) of art. 4.

NSCA Is Inconsistent With art. 149 Of The Federal Constitution

[39] Learned counsel for the plaintiff contended that the NCSA is invalid on the ground that it is inconsistent with art. 149 of the Constitution.

[40] It is necessary to consider the ambit and scope of art. 149 of the Constitution. It is noted that art. 149 is an enabling provision that empowers Parliament to make a special law relating to specific situations concerning security and public order. The article provides that if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons of the kind specified in cl. (1)(a) to (e) of art. 149, "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13, or would apart from this article to be outside the legislative power of Parliament".

[41] In plain terms, the scheme of this special law is that the provisions of the law are valid notwithstanding that the said provisions:

(a) may be inconsistent with the provisions of arts. 5, 9, 10 or 13; or

(b) are apart from this article outside the legislative power of Parliament.

[42] The challenge by the plaintiff in respect of the NSCA is based on the ground that the law is inconsistent with the provisions of art. 149. To say that a security law can only be made under art. 149 would place a severe limitation on the power of Parliament to make laws relating to security.

[43] Therefore in my view, that challenge goes directly to the power of Parliament to make law.

Conclusion

[44] In my view, the application for the *ex parte* injunction is based on the subject matter which the High Court has no jurisdiction to embark on the challenges made against the impugned laws. The plaintiff's challenge therefore clearly falls within the scope of art. 4, cls. (3) and (4) of the Federal Constitution.

[45] Based on the above reasons, the preliminary objection is allowed and hence the OS is dismissed with no order as to costs.